



the Tenth Circuit has “tended to follow a somewhat liberal line in allowing intervention.”

National Farm Lines v. Interstate Commerce Comm’n, 564 F.2d 381, 384 (10<sup>th</sup> Cir. 1977). This includes using the “interest test” as a practical guide to “ ‘disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.’ ”

Coalition of Arizona/New Mexico Counties v. Dept of Interior, 100 F.3<sup>rd</sup> 837, 841 (10 Cir.1996), citing Nuesse v. Camp, 385 F.2d 694, 700 (D.C.Cir. 1967)

In Coalition of Arizona/New Mexico Counties v. Dept of Interior, 100 F.3<sup>rd</sup> 837 (10 Cir.1996), the Tenth Circuit found that a wildlife photographer who had photographed and studied the Mexican Spotted Owl had a substantial and legally protectable interest warranting intervention in an Endangered Species Act case. In that case, the petitioner for intervention admitted he had no property interest in the Mexican spotted owl. The Tenth Circuit reversed the trial court’s denial of his motion to intervene, stating that “economic interest is not the sine qua non of the interest analysis for intervention as of right. To limit intervention to situations where the applicant can show an economic interest would impermissibly narrow the broad right of intervention enacted by Congress and recognized by the courts.” 100 F. 3d at 841. The Court then recites several other examples in which intervention was allowed where there was no economic interest at stake.

The State cites City of Stilwell v. Ozarks Rural Elec. Coop., 79 F.3d 1038 (10<sup>th</sup> Cir. 1996), as support for its proposition that a “non-property” interest does not satisfy the Rule 24(a)(2) interest requirement. However, this case stands for the proposition that the interest at stake must be direct, and not attenuated or contingent. City of Stillwell concerned a municipality’s attempt to condemn electric facilities and service rights of defendant Ozarks Rural Electric Cooperative. KAMO, a non-profit rural power generation and transmission cooperative owned by its seventeen member distribution cooperatives, including defendant Ozarks, moved to

intervene. KAMO's sale of power to Ozarks represented 4.4% of its sales to its member cooperatives. The Tenth Circuit affirmed the trial court's denial of intervention, finding that KAMO had no interest in the distribution system facilities that were the subject of the condemnation proceeding; its interest was merely contingent and not "direct and substantial."

In this case, the Cordova-Martinez Ditch is the distribution system for the water rights in question. While it may not have a property or economic interest in those rights, it certainly has a direct and substantial interest in the adjudication of those rights, which have a direct and substantial impact on the structure of the ditch itself. See Cordova-Martinez Motion to Intervene, filed July 31, 2001, at pp. 3-6.

The State asserts that Petitioner cannot demonstrate that the disposition of these proceedings may, as a practical matter, impair or impede its ability to protect that interest. It asserts that since all orders entered during this phase of proceedings are "subject to the right of other claimants to file objections to individual orders," than any order entered by the Special Master will have no "greater effect." However, the very purpose of allowing intervention is to involve as many as concerned parties as possible, for the purposes of both due process and judicial economy. Many objections can be resolved by allowing intervention now, in a unified proceeding. As a **practical** matter, the opportunity to file objections in the "eventual *inter se* phase of these proceedings", State's Response at p. 4, may be years, if not decades, in the future. By that time, any damage or disturbance in ditch management resulting from these initial proceedings may be irrevocable, or the subject of subsequent litigation. See Olson v. H& B Properties, 18 N.M. 495, 882 P.2d 556 (1994)[where adjudication of water rights on a ditch led to separate and subsequent litigation over water distribution schedules]. As a **practical** matter, Petitioner now has the funding from the New Mexico State Legislature to pay for legal services

to protect its interests. This funding is not guaranteed to be available at that uncertain time when an objection may be entered.

## **II. Petitioner's counsel cannot represent Defendants.**

The State asserts that Petitioner's counsel should be required to enter her appearance on behalf of individual members rather than function as "de facto" attorney in the hearings. The State bases its arguments on the fact that Petitioner's counsel has "ghostwritten" interrogatories for individual subfile claimants. The State's argument is disingenuous, given the history of proceedings to this point.


Counsel for Petitioner cannot enter an appearance on behalf of individual subfile claimants due to the inherent and potential conflicts of interest in so doing. Petitioner's interest is separate and distinct from the individual subfile claimants who may claim an interest in the Ditch itself. Those interests may or may not be congruent. The State chooses to assume that they are congruent. Counsel for Petitioner has made its position known to the State during the many months of field investigations; due to the conflict of interest, she can not represent any individual water rights claimant. It is ironic that the State has benefited from the assistance and aid provided by Petitioner in identifying and correcting errors (including identifying some of the very defendants in this case), and yet it now wishes to prevent Petitioner from protecting its own interests.

One aspect of counsel's duties in advising Petitioner is to make available to all of its members, including the defendants in these proceedings, sample forms that they may then use in preparing their own individual defenses. These include initial disclosures forms, witness lists, interrogatories and other such documents that individual defendants can then tailor for their own uses and on their own behalf. This is a far cry from acting as "de facto" attorney. Petitioner cannot protect its own interests unless it is granted party status.

WHEREFORE, for the reasons stated above and in Petitioner's Motion to Intervene, Petitioner respectfully asks this Court to grant its motion to intervene as of right by Fed. R. Civ. P. 24(a)(2), or in the alternative, pursuant to Fed. R. Civ. P. 24(b)(2).

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**CERTIFICATE OF SERVICE**

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